

JERRY KELLY,
Appellee

v.

BUREAU OF LAND MANAGEMENT,
Appellant

SHELDON W. LAMB,
Intervenor-Appellant

IBLA 91-451

Decided October 31, 1994

Appeal from a decision of Administrative Law Judge Ramon M. Child setting aside and remanding for further consideration the Lahontan Resource Area Manager's decision rejecting Jerry Kelly's application for grazing use on the Boyer Ranch allotment and awarding use to competing applicant, Sheldon W. Lamb. NV-030-90-2.

Administrative Law Judge's decision vacated; case remanded to BLM with instructions.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings--Rules of Practice: Appeals: Burden of Proof

By regulation, 43 CFR 4.478(b), the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an Administrative Law Judge and by this Board.

2. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings--Rules of Practice: Appeals: Burden of Proof

The standard of proof to be applied in weighing the evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of evidence test. Where a decision

determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper.

3. Board of Land Appeals--Contracts: Generally--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

In an appeal of a BLM decision adjudicating grazing privileges, neither an Administrative Law Judge nor the Board of Land Appeals has authority to entertain a claim by one grazing applicant of breach of the terms of a contract between the United States, acting through the Department of the Navy, and one of the other applicants.

Smith v. BLM, 129 IBLA 304 (1994), modified, as explained herein.

APPEARANCES: Dennis E. Evans, Esq., Fallon, Nevada, for Sheldon W. Lamb; Burton J. Stanley, Esq., Sacramento, California, for the Bureau of Land Management; Mike E. Pavlakis, Esq., Carson City, Nevada, for Jerry Kelly.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) and the intervenor in the proceeding below, Sheldon W. Lamb, have appealed from a July 31, 1991, decision of Administrative Law Judge Ramon M. Child setting aside the December 15, 1989, decision of the Lahontan Resource Area Manager, Carson City District, BLM, rejecting Jerry Kelly's application and approving Lamb's application for grazing use of the Boyer Ranch allotment. Both Lamb and Kelly sought grazing rights to 1,790 animal unit months (AUM's) on the Boyer Ranch allotment from May 1 of each year to February 28 of each succeeding year.

I. Procedural and Factual Background

The land in question, the Boyer Ranch allotment, is located in northwestern Nevada and is divided east-west by the Pershing/Churchill County line (Tr. 124; Exh. A-1). The small northern part of the allotment, located in Pershing County, is included in the BLM Winnemucca District and the larger southern part of the allotment, located in Churchill County, is in the BLM Carson City District (Tr. 123-24). ^{1/} However, the Lahontan Resource

^{1/} Kelly testified that, historically, the Boyer Ranch allotment had been two allotments with the area north of the county line in Pershing County being designated as the Cottonwood allotment or the South Buffalo allotment (Tr. 123-24). R. H. "Cub" Wolfe, a Supervisory Range Conservationist, testified that all or parts of three present allotments which lie north of the

Area, within the Carson City District, controls the permitting of the entire Boyer Ranch allotment, even though it has no management responsibilities in the northern part of the allotment located in Pershing County (Tr. 636-38). The Area Manager characterized that northern part of the allotment as "very rough outcropping topography" suitable for big horn sheep (Tr. 638).

Adjacent to the portion of the Boyer Ranch allotment in Churchill County is the Hole-in-the-Wall allotment for which Kelly has held the grazing preference since 1984 (Tr. 59-60; Exh. A-1). Immediately to the east of the northern part of the Boyer Ranch allotment in Pershing County is the Jersey Valley allotment for which Kelly also holds the grazing rights (Exh. A-1). Located within that allotment is Kelly's DJ Ranch, which is identified as base property for the Boyer Ranch allotment (Tr. 55). 2/ The third allotment for which Kelly holds the grazing rights is Home Station, which is located in Lander County, east of the Jersey Valley allotment. 3/ The Boyer Ranch, Hole-in-the-Wall, and Jersey Valley allotments are located within the Dixie Valley.

Lamb held the grazing preference for the Boyer Ranch allotment from May 1967, when he purchased the Boyer Ranch, which he renamed the Pick-E Ranch, until December 30, 1986, when, following 2 months of negotiation, he sold his Pick-E Ranch to the United States Navy for \$857,000 (Exh. I-3, Exh. A-7; Tr. 695). 4/ The Navy acquired that land because it was within its Supersonic Operating Area, which is outlined in black on map Exhibit A-1 (Tr.

764-67). 5/ The contract under which Lamb sold the Pick-E Ranch to the Navy provided as follows:

fn. 1 (continued)

Churchill/Pershing County line--the northern part of the Boyer, the Cottonwood Canyon, and the Jersey Valley, were once part of the South Buffalo allotment (Tr. 421-22).

2/ Kelly testified that one of the seven parcels of land making up the 880-acre DJ Ranch consists of 80 acres and is located "just outside of the Jersey Allotment" (Tr. 56). Kelly marked that location on map Exhibit A-1 as just across the northern boundary of the Jersey Valley allotment.

3/ Kelly outlined in green on map Exhibit A-1 his three allotments (Tr. 59-60). Home Station is not separately noted on Exh. A-1, but appears thereon as a portion of the Fish Creek allotment (Tr. 60-61).

4/ At that time, his ranch consisted of two parcels described in Exh. A-7, "Offer to Sell Real Property," as Parcel 001, consisting of 320 acres, more or less, and Parcel 005, containing 760 acres, more or less. Lamb identified those parcels as "Dixie Meadows" and "Cottonwood Canyon," respectively (Tr. 693). Another 160-acre parcel of the Pick-E Ranch, known as Seven Devils, had been sold by Lamb in 1979 (Tr. 694). In 1983, Lamb entered into a contract to repurchase Seven Devils (Tr. 698; Exh. I-6). As part of the settlement of a suit for specific performance filed by the owners of the Seven Devils property, Lamb reacquired Seven Devils in 1988. Seven Devils is located just north of the Jersey Valley allotment in Pershing County within the Supersonic Operating Area (Tr. 115-16; Exh. A-1).

5/ Counsel for Lamb explained at the hearing that the Navy purchased property in Dixie Valley because they were "trying to get rid of habitation" in

It is understood and agreed that [Lamb] will relinquish all grazing permits to the Bureau of Land Management for which the property being sold hereunder served as the base operation, that after relinquishment of all grazing permits [Lamb] may reapply for new grazing permits provided [Lamb] covenants to the Government that if * * * he reappl[ies] for new grazing permits:

(1) the new grazing permits will not have a base operation located in the Supersonic Operating Area * * *; and

(2) [Lamb] will never, in any way, establish or acquire, or have any personal involvement or financial interest in the establishment or acquisition, of a base of operation in the Supersonic Operating Area for use in exercising rights under new grazing permits.

(Exh. A-7 at 3-4).

In an application dated January 23, 1987, Lamb reapplied for the grazing rights in the Boyer Ranch allotment utilizing leased land in Fallon, Nevada, as his base property. Fallon is approximately 130 miles from the center of the Boyer Ranch allotment (Tr. 109). A number of other individuals, including Kelly, filed competing applications for that preference. The Area Manager issued a proposed decision in favor of Lamb. Kelly filed a protest. On August 10, 1987, the Lahontan Resource Area Manager issued a final decision denying Kelly's protest and awarding the preference to Lamb on the basis that he had filed an application to transfer his Boyer Ranch preference to other qualified base property.

Kelly appealed and following a hearing before former Chief Administrative Law Judge Parlen McKenna, the parties entered into a stipulation for settlement, which was submitted to the Judge. On the basis of that stipulation, the Judge entered an order dismissing the appeal and remanding the case to the Area Manager for action consistent with the stipulation. The stipulation provided that the matter would be "remanded to the Bureau of Land Management to determine as between Appellant Jerry Kelly and Intervenor Sheldon Lamb, the appropriate party who should receive the grazing preference which is the subject of this appeal" (Judge's Exh. 1 at 1). In accordance with the stipulation, the BLM authorized officer was to use as his sole criteria in determining the appropriate party the provisions of 43 CFR 4130.1-2, which the stipulation listed as:

- (a) Historical use of the public lands;
- (b) Proper range management and use of water for livestock;
- (c) General needs of the applicant's livestock operations;

fn. 5 (continued)

the Supersonic Operating Area, where the Navy tests combat aircraft operating out of the Naval Air Station in Fallon, Nevada (Tr. 764-65). Apparently, however, the Navy made no purchases in the Supersonic Operating Area north of the Churchill/Pershing County line (Tr. 766).

(d) Public ingress or egress across privately owned or controlled land to public lands;

(e) Topography; and

(f) Other land use requirements unique to the situation.

(Judge's Exh. 1 at 2).

The stipulation specifically stated that Lamb would not be entitled to "any preference or priority based upon his status as the current or prior holder of the subject grazing preference" (Judge's Exh. 1 at 2).

On December 15, 1989, the Area Manager issued a final decision, pursuant to the remand stipulation, awarding the use to Lamb based on the conclusion that Lamb was the preferred applicant under criteria (b) and (c), and neither Kelly nor Lamb was preferred under criteria (a), (d), (e), and (f) (Exh. A-10). The Area Manager based his decision on a September 8, 1989, Staff Report prepared by R. H. "Cub" Wolfe, a Supervisory Range Conservationist (Tr. 134, 338, 639; Exh. I-4). Kelly again appealed. Judge Child conducted a hearing in February 1991, and in July 1991, he rendered his decision setting aside and remanding the Area Manager's decision for further consideration concluding that the Area Manager's decision was not rationally based on a complete and accurate assessment of the relevant facts under these criteria and was arbitrary, capricious, and inequitable. As noted above, BLM and Lamb have both appealed from Judge Child's decision. 6/

II. Issue

The issue for resolution in this case is whether the Area Manager properly evaluated the Kelly and Lamb applications based upon the criteria set forth in 43 CFR 4130.1-2 and repeated in the stipulation. Judge Child

6/ On Aug. 3, 1992, John E. Marvel, Esq., representing Don and Martha Sims d.b.a. Sims Livestock (the Sims), filed a letter with the Board requesting that "this matter be remanded to the Lahontan Resource Area, Carson City District of Nevada, so that their legal rights, interests, and entitlements can be properly and fairly considered in light of their application for and interest in the subject grazing preference." In response to that filing, the Board offered the parties the opportunity to respond. Kelly and Lamb each filed a response, both arguing that the Sims' remand request should be denied. BLM did not respond.

Kelly and Lamb state that the Sims were among several parties who filed for the Boyer Ranch allotment preference in 1987, but when BLM awarded that preference to Lamb in its Aug. 10, 1987, decision, only Kelly filed an appeal. The Sims were adversely affected by that decision, but they did not file an appeal (Tr. 632). Their right to challenge the award of grazing preference in the Boyer Ranch allotment expired at the end of the appeal period for BLM's Aug. 10, 1987, decision. The request for remand to allow consideration of the interest of the Sims is accordingly denied.

concluded that he did not. While we agree that the Area Manager erred in his analysis and determination, we reach that result, in part, for substantially different reasons than Judge Child. Moreover, our analysis requires that we vacate Judge Child's decision and remand this case to BLM for the purpose of awarding the Boyer Ranch allotment to Kelly, all else being regular. The rationale for our determination is set forth below.

III. Applicable Law

[1] The law is well settled that implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a to 315r (1988), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein. By regulation, the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an Administrative Law Judge and by this Board. Eason v. BLM, 127 IBLA 259, 260 (1993). Although unusual, this scope of review is consistent with the highly discretionary nature of the Secretary's responsibility for Federal range lands. Id.; Claridge v. BLM, 71 IBLA 46, 50 (1983).

[2] In Eason, the Board established that the standard of proof to be applied in weighing the evidence presented at a hearing held pursuant to an appeal of a grazing decision issued by BLM is the preponderance of evidence test. 127 IBLA at 262-63. ^{7/} Thus, where a decision determining grazing privileges has been reached in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper.

IV. Discussion

We will examine the analysis undertaken by BLM and Judge Child of the regulatory factors upon which BLM based its decision in this case.

A. Historical Use of the Public Lands

In his final decision, the Area Manager stated that Lamb's historical use had not been considered; that Kelly had no historical use of the Boyer Ranch allotment; and that neither applicant was preferred under this criterion. Judge Child found error in this analysis stating:

^{7/} In a recent grazing decision, Smith v. BLM, 129 IBLA 304, 307, 311-12 (1994), we adopted the Administrative Law Judge's decision, and in so doing, inadvertently endorsed the standard of proof that we ruled in Eason was incorrect. The standard of proof in Smith should also have been preponderance of the evidence. To that extent, our decision in Smith must be modified. However, application of the preponderance of evidence standard in Smith would not affect the result reached in that case.

An examination of the historical use of the Boyer Ranch allotment reveals that [Lamb] has grazed cattle thereon from 1967 to the present. (Tr. 693, Exh. I-3) Nevertheless, the Area Manager correctly determined, pursuant to the Stipulation for Settlement, that [Lamb's] historical use should not be considered in rendering the final decision. The Area Manager further determined that [Kelly] had no historical use on the Boyer Ranch allotment and therefore concluded that neither applicant was preferred under the first criterion. (Exhibit A-10)

In concluding, that [Kelly] had no historical use, the Area Manager failed to consider the fact that [Kelly] holds 1,331 suspended AUM's in his Jersey Valley allotment which previously were held by his predecessor in interest. Historically, these suspended AUM's were allocated to the South Buffalo allotment located north of the Pershing County line in the Winnemucca Grazing District. At that time, the portion of the present Boyer Ranch allotment located north of the Pershing County line, and the Jersey Valley allotment were part of the South Buffalo allotment. [Kelly] testified that the suspended AUM's, if activated, were to be exercisable in said portion of the present Boyer Ranch allotment. (Tr. 65-66, 120-124, 421-424, 630-631)

The Area Manager's reasons for refusing to consider these suspended AUM's were (1) that he had no authority to make management decisions across grazing district lines and (2) that he did not have the information necessary to support any adjustments in grazing use within the Winnemucca District. (Tr. 634-635) Both reasons are contrary to the history of cooperative management between the Carson City and Winnemucca grazing districts. (Tr. 618-620, 624) Furthermore, the testimony of both the Area Manager and his subordinate, Mr. Wolfe, shows that information regarding these suspended AUM's and the relevant area was in their possession or readily ascertainable through inquiry. (Tr. 421-424, 630-631) Thus, the Area Manager should have considered whether the additional forage on the Boyer Ranch allotment should have first been apportioned to [Kelly] due to the historical allocation of the suspended AUM's. So considered, the Area Manager could have well found [Kelly] to have been entitled to a preference under criterion (a).

(Decision at 4-5).

Lamb challenges the Judge's analysis arguing that Judge Child and the Area Manager both erroneously determined that historical use of the Boyer Ranch allotment by Lamb and his predecessors was not a proper consideration based on the terms of the stipulation (Statement of Reasons (SOR) at 16). 8/

8/ BLM filed only a two-page statement of reasons stating that it "concurs with and adopts for all purposes" the statement of reasons for appeal filed

Lamb asserts that even though the stipulation provided that he was not entitled to any preference or priority based upon his status as the current or prior holder of the Boyer Ranch allotment, it also states that "historical use" is a factor to be considered in determining whether the grazing allotment should be awarded to Lamb or Kelly. Reading these provisions together, Lamb contends, yields little doubt as to their meaning:

While LAMB was to receive no automatic priority or preference simply by virtue of the fact that he is the present and prior holder of the Boyer Allotment (i.e., his status), the "historical use" of the Allotment, by both LAMB and his predecessors, was one of the factors to be considered by the Area Manager. [Emphasis in original.]

(SOR at 13). Lamb asserts that if the Area Manager and Judge Child weighed historical use, as did the September 8, 1989, staff report (Exh. I-4), they would have found Lamb to be the preferred applicant under this criterion. ^{9/}

Lamb also contends that Judge Child erroneously concluded that BLM erred in failing to consider the suspended AUM's attached to the Jersey Valley allotment. Lamb argues that Judge Child improperly based his conclusion on two factors: (1) the Area Manager's reason for not considering the suspended AUM's was contrary to the history of cooperative management between the Carson City and Winnemucca grazing districts; and (2) information concerning the suspended AUM's was available to the Area Manager. Lamb contends that Judge Child was in error as to factor 1, and, as a result, factor 2 becomes immaterial (SOR at 16).

Lamb insists that at all relevant times these suspended AUM's were attached to the Jersey Valley allotment within the Winnemucca District. He argues that the Area Manager detailed his reasons for not considering suspended AUM's in connection with these applications for a grazing permit in the Carson City District (Tr. 630-38), testifying that he had no authority to make management decisions across district lines (Tr. 634). Lamb con-tends, moreover, that the Area Manager made clear that even if there was no impediment to considering the suspended AUM's, he would still not award them to Kelly because of the geography and topography involved (Tr. 630-38).

fn. 8 (continued)

by Lamb. The only specific finding of Judge Child which BLM addressed was that regarding the Navy contract (see discussion, infra). BLM stated that

"neither the BLM's decision-making process nor the Navy's absence from these proceedings permit the Area Manager or any other Interior official from determining Lamb's rights in relation to the Navy contract" (BLM Statement of Reasons at 1-2.)

^{9/} The Staff Report recommended Lamb as the preferred applicant under the historical-use criterion. The report stated that Lamb's "experience, knowledge and ability of proper rangeland management is an asset in meeting the public land management objectives for the allotment, which has been demonstrated over the past 22 years" (Exh. I-4 at 5).

[2] We find neither applicant to be preferred under the historical-use category. The regulation itself states that the criterion is "[h]istorical use of the public lands (see 43 CFR 4130.2(d))." 43 CFR 4130.1-2(a). The cited regulation, 43 CFR 4130.2(d), states that "[p]ermitees or lessees holding expiring grazing permits or leases shall be given first priority for new permits or leases," under certain conditions. In the stipulation, the parties agreed that Lamb would receive no preference or priority because of his current or past use of the Boyer Ranch allotment, and neither Lamb nor Kelly was a permittee or lessee "holding expiring grazing permits or leases."

However, we agree with counsel for Lamb that the restriction in the stipulation does not eliminate the historical-use criterion from consideration. Nevertheless, consideration of that factor does not result in a preference for either applicant because both Lamb and Kelly have a history of use of the public lands for grazing and, contrary to Judge Child's finding, Kelly is not entitled to consideration of his suspended AUM's under this criterion.

Lamb used the Boyer Ranch allotment for his cattle commencing in May 1967 (Exh. I-3). Kelly asserts that from 1978 to 1984 he operated a cattle ranch from which he utilized public lands in the Trout Creek mountains, and that in 1984, he began his DJ Ranch operation in Dixie Valley (Exh. I-2). Kelly testified that he or his predecessor in interest took approximately 1331 suspended AUM's in "[w]hat used to be the South Buffalo Allotment" (Tr. 65-66). Wolfe explained that those suspended AUM's were subsequently assigned to the Jersey Valley allotment (Tr. 423-24), and that he had learned from the Winnemucca District that approximately half the AUM's were suspended due to a range survey that showed that the "production was not there," apparently meaning the available forage (Tr. 424). He stated that the other suspended AUM's resulted from a sheep to cattle conversion, which usually results in "AUMs left over" (Tr. 424). When questioned whether he had informed Kelly of this in response to letters from Kelly inquiring about the suspended AUM's, Wolfe stated: "I probably didn't. I've just learned this from the Winnemucca District." Id.

At the time the AUM's were suspended, the Jersey Valley and Boyer Ranch allotments were part of the South Buffalo allotment and the South Buffalo allotment was administered by the Carson City District, as were Kelly's other allotments, Home Station (also originally part of the South Buffalo) and Hole-in-the-Wall. Wolfe testified that, prior to the time that Kelly protested the BLM decision in this case, he reported only to the Carson City District (Tr. 491). Thereafter, over Kelly's objection, BLM switched administration of his allotments so that he had to report to three different districts--Carson City for the Hole-in-the-Wall allotment, Winnemucca for the Jersey Valley allotment, and Battle Mountain for the Home Station allotment (Tr. 491).

However, the fact that appellant holds suspended AUM's originally assigned to an allotment which included part of the land now included in the Boyer Ranch allotment does not result in the conclusion that Kelly is

entitled to preference under the historical-use criterion. Although Judge Child found the Area Manager did have authority to make management decisions across district lines and the information to make such a decision was available to him, Judge Child ignored the Area Manager's testimony that even if he felt that he could consider the Jersey Valley suspended AUM's, they could not be exercisable in the portion of the Boyer Ranch allotment north of the Churchill/Pershing County line because of the rugged topography. Map Exhibit A-1 shows that area to be small, consisting of mountainous terrain, clearly not an area in which 1,331 suspended AUM's could be exercised. Moreover, Wolfe testified that while interdistrict agreements are utilized, they are only used for administrative purposes and that the permittee holding suspended AUM's in a particular allotment would have priority based on those AUM's only in that allotment (Tr. 230-33).

We find there is no rationale for assigning preference to Kelly for the Boyer Ranch allotment for suspended AUM's that he presently holds in the Jersey Valley allotment, even though some of those suspended AUM's may have originated from an allotment that at one time included lands within the present Boyer Ranch allotment boundaries. Neither applicant is preferred under the historical-use criterion.

B. Proper Range Management and Use of Water for Livestock

In his decision, the Area Manager discussed the relative merits of Lamb and Kelly under this criterion and concluded that Lamb was the preferred applicant. Wolfe testified at the hearing that this criterion was the most important to him (Tr. 491).

Judge Child concluded that the Area Manager's determination was "defective" and that he failed "to consider or accurately determine other relevant facts" which "resulted in unwarranted disparate treatment of [Kelly] and [Lamb]" under this criterion (Decision at 5). Judge Child essentially identified four areas in which the Area Manager's determination was defective.

a. Water Availability

As Judge Child points out, the Area Manager testified at the hearing that ownership of the water rights in the Boyer Ranch allotment were "very critical" to his conclusion that Lamb was preferred under this criterion (Tr. 642, 649). The Area Manager stated that the information relied on in making that decision was "contained in the application in which that certification was made" (Tr. 642). In his December 15, 1989, final decision at page 2, the Area Manager stated that "[i]f Mr. Kelly were to obtain the preference on the Boyer Ranch Allotment he would also have to acquire the water rights for stock water on the allotment from Mr. Lamb who presently controls these rights" (Exh. A-10, Exh. I-4).

In his decision, Judge Child found that no attempt had been made to determine the adequacy of water sources available to Kelly in the Boyer Ranch allotment, that the record showed Kelly leased land from the Navy

in the allotment (marked in black on map Exh. A-1; Tr. 79), which included water sources, and that the allotment contained unappropriated "streams and springs sufficient to sustain grazing during the summer grazing season" (Decision at 5).

On appeal, Lamb admits that there "is sufficient water on the Boyer Allotment for full utilization of the allotment by whoever may hold it" (SOR at 18). That admission is, in fact, consistent with the testimony of Wolfe on cross-examination:

Q. Isn't it true, Mr. Wolfe, that the summer area of the Boyer Allotment is primarily up in the mountain areas as described by Mr. Kelly?

A. Yes, it's in the higher country.

Q. And isn't it true, Mr. Wolfe, that that mountainous summer area is all watered by summer springs and intermittent streams?

A. The majority of it is watered like that, yes.

Q. And isn't it true that those sources of water, the springs and streams, are sufficient to meet the needs of cattle using the area during the season of use?

A. Yes.

(Tr. 477-78).

Thus, we find that there is sufficient water available on the Boyer Ranch allotment for either Lamb or Kelly. To the extent the Area Manager's decision was premised on water availability, it was clearly erroneous.

b. Water Source Maintenance

The Area Manager also based his preference for Lamb under this criterion on Kelly's alleged failure to maintain water wells on his Hole-in-the-Wall allotment. In his decision, the Area Manager stated:

Mr. Kelly has not kept the three water wells on the Hole-in-the-Wall allotment operational and available for livestock use which has resulted in poor livestock distribution. BLM has assisted with materials[;] however, several field checks found these wells with no water available during the 5 months of use on the allotment.

(Exh. A-10 at 2). Judge Child found that the Area Manager's conclusion that Kelly failed to maintain water sources on his existing allotment was based on erroneous facts. He stated:

In truth, Mr. Wolfe, who conducted the field checks, could identify no specific occasion upon which a field check revealed problems with wells during a period of use. Of the three field checks identified by Mr. Wolfe, one field check occurred after the date of the final decision and therefore could not have been considered in making a decision. (Tr. 450) One field check during a period of nonuse revealed a nonfunctioning well but [Kelly] was not required to maintain the wells during periods of non-use. (Tr. 461) With respect to the third field check, Mr. Wolfe could provide no details whatsoever. (Tr. 450)

(Decision at 6-7).

On appeal, although Lamb admits that sufficient water exists on the Boyer Ranch allotment for either him or Kelly, he argues that given Kelly's "track record with respect to the water sources on his present allotment," his problems "would only be exacerbated by the addition" of more water sources on the Boyer Ranch" allotment (SOR at 18). Lamb argues that Judge Child, in relying on certain testimony by Wolfe, failed to consider that both Wolfe, in preparing the staff report, and the Area Manager "had the benefit of reviewing the entire BLM files concerning both applicants" (SOR at 20). The decision, he contends, ignores the more conclusive testimony of Wolfe based upon his investigation concerning the maintenance of water sources by Kelly (Tr. 235-38, 448-50) and the significance of this problem (Tr. 451-52, Tr. 20; SOR at 19-20).

Lamb has provided no basis for overturning Judge Child's ruling on the water maintenance issue. The relevant transcript pages cited by Judge Child, supra, fully support his ruling. Lamb's implication that "the entire BLM files concerning both applicants" must have provided BLM with support for its actions is absurd. BLM had every opportunity at the hearing to bolster the testimony of Wolfe and the Area Manager by presenting other evidence relating to water source maintenance. It did not do so. Nor did BLM expound on appeal about the existence of other evidence that would have bolstered its action. Finally, the transcript pages cited by Lamb do not contain, as represented, "more conclusive testimony" regarding maintenance of water sources. Wolfe could provide no more specifics regarding the alleged problem.

The record in this case does not support the conclusion reached by the Area Manager on water source maintenance.

c. Credit for Nonuse

Lamb challenges Judge Child's ruling that the Area Manager failed "to give credit to [Kelly] for voluntary nonuse of his preference, even though credit was given to [Lamb] for cooperating in the reduction of his preference. (Tr. 377, 462; Exhibit A-10)" (Decision at 5). Lamb asserts that Kelly's nonuse was not voluntary; rather it was the result of Kelly's lack of year-round grazing rights, specifically summer grazing (Tr. 80-82, 193-

94; SOR at 19). Also he contends that the record shows that BLM was aware of Kelly's "nonuse and appreciated it" (SOR at 19).

The record fails to support Judge Child's finding that the Area Manager gave "credit" to Lamb for cooperating in the reduction of his preference, while giving no "credit" to Kelly for his voluntary nonuse. First, the record does not clearly establish that Kelly's nonuse was voluntary. The transcript citations provided by Lamb indicate that the principal reason for nonuse by Kelly was the limited availability of summer grazing for his livestock. Second, Wolfe testified on two occasions that BLM appreciated Kelly taking nonuse because it helped improve the condition of the range (Tr. 377, 462).

d. Improvements to Allotments

In his December 15, 1989, final decision, the Area Manager stated, regarding improvements to allotments, as follows:

Mr. Kelly acquired a ranch that was base property for three individual, unfenced grazing allotments which did not provide for a complete year round operation because they lacked adequate summer range. These allotments were originally both sheep and cattle operations and all had different periods of use. By converting all the sheep preference to cattle has not helped make them a complete year round operation. There is inadequate summer range and private lands can not support the herd during this period using native forage. Mr. Kelly has tried to make things work; however, current vegetative conditions on two allotments are poor with apparent trend downward. This has resulted in placing these two allotments in an "I" Intensive Management Category. [10/] To improve these allotments, future reductions in total grazing use are apparent including reductions of wild horses. Improvement in vegetative conditions could not result without these reductions. Mr. Kelly does have a problem with his current operation which could be solved in part if he had sufficient grazing for the entire herd during the summer period. He is limited on how he could improve public lands without further reducing his current herd size.

(BLM Final Decision at 2).

In addressing the Area Manager's decision and the evidence presented at the hearing, Judge Child stated:

10/ BLM had three management categories for allotments--"I" for intensive management, "M" for maintenance, and "C" for custodial. An allotment rated "I" requires the greatest amount of attention by BLM and the permittee due to the poor quality of the range. An allotment rated "C" needs the least attention, with an "M" allotment falling in the middle. The Hole-in-the-Wall, Boyer Ranch, and Jersey Valley allotments are rated "I," "M," and "C," respectively (Tr. 468-69).

[C]redit was given to [Lamb] for improvement of the Boyer Ranch allotment, but no credit was given to [Kelly] for improvement of the Hole-in-the-Wall allotment under his stewardship. (Exhibit A-10) Rather than giving [Kelly] credit for improvement of the Hole-in-the-Wall allotment, the Area Manager falsely concluded that his allotment was suffering from a downward trend in its vegetative condition, resulting in its placement in the "I" (intensive) management category. (Exhibit A-10) The Area Manager was also incorrect in concluding that two of [Kelly's] allotments had been placed in the "I" category. In fact, only the Hole-in-the-Wall was so classified. (Tr. 59-61, 240)

In reality, when [Kelly] began grazing the Hole-in-the-Wall allotment in 1984, the allotment was already in the "I" management category. (Tr. 595, Exhibits I-2, and I-5) Mr. Wolfe, the range conservationist assigned to the Hole-in-the-Wall allotment, testified that the problems in said allotment were attributable to poor management prior to [Kelly's] stewardship and severe resource conflicts, particularly wild horses competing with cattle for forage. (Tr. 463, 585-586, 590-591, 598-602) In comparison, the Boyer Ranch allotment was much easier to manage and, in fact, was essentially self-maintaining (Tr. 426, 477-478). Mr. Wolfe further testified the study data showed no change in either the Boyer Ranch allotment or the Hole-in-the-Wall allotment, but that he believed that each of these allotments had improved slightly. (Tr. 563-569) Contrary to the Area Manager's conclusions, Mr. Wolfe observed that the Hole-in-the-Wall allotment had improved with [Kelly's] cooperation, despite drought conditions and a large wild horse population, and that the allotment remained in the "I" management category due to resource conflicts. (Tr. 587-602)

(Decision at 6).

Lamb maintains that even though the Area Manager did not mention in his decision the improvements made by Kelly to his allotments since 1984, that fact does not mean that he did not consider them. Lamb denies that the Area Manager stated that the placement of Kelly's allotments in the "I" category was the result of Kelly's management contending that the statement relating to placement in the "I" category relates to that portion of the paragraph preceding the statement. Finally, Lamb contends the fact that one or more of Kelly's allotments are in poor condition, whatever the cause, does not reflect upon Lamb's proven excellent stewardship in management of the Boyer allotment for a period in excess of 20 years (SOR at 19).

Judge Child correctly points out the errors in the Area Manager's findings on this issue. Lamb does not deny that only one of Kelly's allotments, the Hole-in-the-Wall, not two as stated by the Area Manager, is classified in the "I" category. In addition, he does not deny that the Hole-in-the-Wall allotment has that classification for two reasons, a severe wild horse

overpopulation and overgrazing by Kelly's predecessors (See Tr. 463). Further, BLM has not come forward to state that the Area Manager actually considered Kelly's improvements. Finally, Wolfe admitted at the hearing that it is easier to maintain the Boyer Ranch allotment than the Hole-in-the-Wall allotment because the Boyer Ranch allotment is in better vegetative condition (Tr. 426).

Judge Child properly ruled that in comparing the stewardship of both applicants, the Area Manager failed to account for the disparity in challenges that confronted management of the respective applicant's allotments in assessing the extent to which each was a good steward (Tr. 425-26, 468-70; Exh. R-3).

The Area Manager noted in his decision that Kelly had on file "a past trespass violation" involving the installation of a water pipeline in a wilderness study area without prior approval (BLM Final Decision at 3). Kelly explained the circumstances surrounding the installation of that pipeline (Tr. 91-95). He maintained that his action was the result of a misunderstanding and that he was unaware of a problem until BLM sent him a notice to show cause why he should not be held in trespass (Tr. 96-98). In response to that notice, he met with BLM officials in Carson City and discussed how to resolve the alleged trespass (Tr. 99; Exh. R-4). Kelly took all actions requested by BLM and the situation was resolved (Tr. 251). Even Wolfe admitted that the situation resulted from "a lot of misunderstanding" and "a lot of miscommunications" (Tr. 500).

Although Lamb clearly has been a good steward of the public lands since the mid-1960's, the implication that Kelly is less than a good steward is not well-founded.

We find that taking into consideration all the subfactors identified by Judge Child in this criterion, neither Lamb nor Kelly is preferred. The record shows both to be good stewards of the public lands.

C. General Needs of the Applicant's Livestock Operations

Under this criterion, the Area Manager stated in his final decision:

Mr. Lamb has stated that the Boyer preference is the only means by which he and his wife can continue in the cattle business. Our review confirms this statement since there are no other available allotments in the area.

* * * * *

The analysis finds Mr. Lamb to be the preferred applicant since he needs the preference to remain in the livestock business and his past management practices have resulted in improving resource conditions on public lands. Mr. Kelly[']s needs are also great, however, the additional preference provided by

the Boyer Ranch allotment will not solve his problems completely and in fact may create a situation in which he could not provide adequate management to properly operate and maintain improvements on all allotments.

(BLM Final Decision at 3).

In his decision, Judge Child ruled that the Area Manager erred in his final decision in failing to "mention the facts regarding [Lamb's] sale of his former base property to the United States pursuant to the Navy contract and his subsequent acquisition, improvement and use of the Seven Devils Ranch in possible violation of said contract" (Decision at 7). After reciting the facts surrounding Lamb's sale of his base property and his purchase of the Seven Devils Ranch, Judge Child stated:

The determination of whether the Seven Devils Ranch constitutes a "base operation" in violation of the Navy contract is a material consideration relevant to the criterion of need. By entering into the Navy contract, [Lamb] agreed to sell his former base property and relinquish his former grazing preferences, thus creating his need to acquire new grazing preferences if he opted to stay in the livestock business. Patently, [Lamb] has need of the grazing preferences in question only if he is to conduct his livestock business on the Boyer Ranch allotment. [Lamb] can conduct a livestock business within the Navy's Supersonic Operating Area only in conformance with the Navy contract which prohibits him from utilizing a "base operation" within the Supersonic Operating Area. If [Lamb] has established a "base operation" within the Supersonic Operating Area, then [Lamb] may have made himself ineligible to operate on the Boyer Ranch allotment and should be required to go elsewhere to conduct his livestock business.

(Decision at 8-9).

In his findings of fact, Judge Child stated that Lamb had "made the Seven Devils Ranch a base operation to the conducting of his livestock business on the Boyer Ranch allotment" (Decision at 12).

On appeal, Lamb vigorously argues that any consideration of the Navy contract by Judge Child was totally improper. Lamb cites three reasons in support of that argument: (1) he did not violate that contract; (2) even if he were in violation, such a violation would be totally immaterial to any issue before BLM in deciding whether to grant a grazing permit to Lamb under the Taylor Grazing Act; and (3) it violates the terms of the stipulation, which limited determination to the criteria (SOR at 20-24).

[3] Judge Child erred in ruling that the Area Manager should have considered the effect of the terms of the Navy contract in evaluating the needs of the applicants' livestock operations. The parties to that contract were the United States, acting through the Department of the Navy, and Lamb. BLM has no authority to adjudicate a claim raised by a stranger

to that contract asserting a breach thereof. In addition, this Board has no authority to do so either. The Board is authorized to issue final decisions for the Department in appeals from decisions of BLM officials relating to the use and disposition of the public lands and their resources. 43 CFR 4.1(b)(3). We have held that "[t]here has been no delegation of authority to this Board which would permit us to adjudicate disputes arising under the law of contracts resulting in a claim for damages for breach of a lease contract." Exxon Corp., 95 IBLA 374, 376 (1987). Likewise, we have no authority, nor does Judge Child, to consider a third party's claim of breach of contract requiring the construction of the terms of the Navy contract.

Despite this conclusion, we do not believe that the Area Manager correctly assessed the needs criterion. Kelly's need for summer range is well documented in the record. Lamb's assertion that acquisition of the Boyer Ranch allotment is the only means by which he can continue in the cattle business is not. That assertion was made in his application (Exh. I-3 at 2) and again at the hearing (Tr. 721-22). However, the record in the case indicates that he might otherwise be able to continue in the cattle business, if he so desires.

Although the Area Manager stated in his final decision that there were no other available allotments in the area, we must assume, based on his management responsibilities, that he meant within the Carson City District. There may be other allotments available in other districts. In addition, immediately following the sale of his ranch, Lamb leased property in Fallon, which he used as base property in his original application (Tr. 716). He then bought a ranch in Fallon consisting of 73 acres, and utilized that as base property in his July 1989 application (Exh. I-3 at 3; Tr. 717). He also purchased another 50 acres in Fallon (Tr. 718). At the time of the hearing, he had a little over 100 head of cattle, including calves, in Fallon and another 100 head of cattle on the Boyer Ranch allotment (Tr. 719). It seems unlikely that the only way that Lamb could remain in the cattle business would be by securing the Boyer Ranch preference. In addition to possible public lands for leasing, apparently private lands are available for purchase or lease, since Lamb both leased and purchased such lands following the sale of his Pick-E Ranch to the Navy. Thus, the record shows that Lamb needs the preference only if he wants to stay in the cattle business in Dixie Valley.

On the other hand, BLM's assumptions concerning Kelly's operations and his inability to fully utilize the Boyer Ranch preference were based on facts which failed to consider the impact of wild horse use on his allotments, as well as on his private lands (compare Tr. 286-90 with Tr. 585 and Exh. A-12). This was so, despite the fact that Wolfe admitted that at the time of BLM's final decision, Kelly's three allotments (Jersey Valley, Hole- in-the-Wall, and Fish Creek) could have contained as many as 1,000 head of horses (Tr. 585). As the Area Manager stated in his final decision, "Mr. Kelly's need for summer grazing is very high and will be a key factor in the needed improvement of his existing allotments resource condition. The success of his future operation does depend on whether he can obtain summer grazing for 500-700 head of cattle or what ever number he decides is to be his herd size" (BLM Final Decision at 3).

Kelly explained his need as follows:

[The Boyer Ranch allotment] would give me summer grazing of an additional 179 head in the summer country. It will allow some buildup of Hole-in-the-Wall, take some time, so many horses using it. There's no horses on Boyer, kind of strange, but there's no horses, about five head of horses on the Boyer Allotment, and this country could be grazed with the Hole-in-the-Wall, give the Hole-in-the-Wall a little break so the grass can come back from heavy horse use. Same with the Jersey Allotment. On the south, just extend a whole lot better use of it. It's very, very convenient to us.

(Tr. 81). Wolfe agreed that if Kelly had more summer grazing, "improvements could occur on Jersey Valley and Fish Creek [Home Station] Allotments, the ones that he's actually using for summer range now" (Tr. 487).

Thus, Kelly's need for additional summer grazing is critical to the viability of his operation, which is centered in the Dixie Valley. Kelly's acquisition of the Boyer Ranch allotment would have the added benefit of allowing him to rest areas of his other allotments in order to improve their condition. Awarding the Boyer Ranch allotment to Kelly would foster BLM's objectives of improving the public lands, enhancing their productivity, and stabilizing the livestock industry dependent upon the public range. See 43 CFR 4100.0-2.

We conclude that the Area Manager erred in his assessment of this criterion and that a proper assessment results in finding that Kelly is the preferred applicant.

D. Public Ingress or Egress

The Area Manager found that public ingress and egress was not an issue in the case and that neither applicant was preferred under this criterion. Judge Child agreed. We do also.

E. Topography

Neither the Area Manager nor Judge Child gave either applicant a preference based on topography. However, we believe topography should have been considered and that an analysis of this factor is favorable to Kelly.

The Boyer Ranch allotment lies in Dixie Valley, the same valley as two of Kelly's other allotments, the Jersey Valley and Hole-in-the-Wall. Kelly's base property, the DJ Ranch, is located in the Jersey Valley allotment, within a few miles of the Boyer Ranch allotment. At the time of the hearing, Kelly held Navy "outleases" on deeded lands formerly owned by Lamb in the Boyer Ranch allotment, which previously served as base property for Lamb's operation on the Boyer Ranch allotment (Tr. 419). Those leased lands are surrounded by the Boyer Ranch allotment. If Kelly were not the

holder of Boyer Ranch allotment preference, he would have to truck his cattle, or trail them pursuant to a trailing permit, in order to utilize those leased lands (Tr. 87). In addition, for Lamb to move cattle to the Boyer Ranch allotment from his Seven Devils Ranch, he must cross Kelly's Jersey Valley allotment, although Lamb testified that he utilized a county road to do so (Tr. 709).

These factors favor Kelly over Lamb, whose base property is in Fallon, Nevada, approximately 130 miles from the Boyer Ranch allotment, and whose only deeded land in the area of the allotment is the Seven Devils Ranch, located just north of the Jersey Valley allotment.

F. Other Land Use Requirements Unique to the Situation

The Area Manager found no other land use requirements unique to the situation and neither applicant to be preferred. Judge Child took no exception to that finding. We agree that this criterion is not relevant to this case.

V. Summary and Conclusions

Based on our review of the record in this case, we find that a preponderance of the evidence supports the conclusion that the Area Manager's decision was unreasonable. That conclusion is based on our findings on the applicable criteria, which are summarized as follows:

1. Neither Kelly nor Lamb is preferred under the historical use criterion.
2. Neither Lamb nor Kelly is the preferred applicant under the proper range management and use of water criterion. Both are good stewards of the public lands.
3. Kelly is the preferred applicant under the general needs criterion.
4. Kelly is the preferred applicant under the topography criterion.
5. Neither the criterion of public ingress or egress or the criterion of other land-use requirements is relevant to this case.

In his decision, Judge Child set aside the Area Manager's decision and remanded the case for further adjudication. However, we will not remand this case for the following reasons. The present record contains ample evidence upon which to base a decision, and, based upon that evidence, we have determined that Kelly was the preferred applicant in two of the relevant categories and that Lamb was not the preferred applicant in any. Thus, remanding the case to the Area Manager for further adjudication would serve no useful purpose since, in accordance with our rulings, he would be required to award Kelly the grazing preference.

Therefore, we vacate Judge Child's decision and remand this case to BLM with instructions to award the grazing preference on the Boyer Ranch allotment to Kelly on the basis of our rulings in this case, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Child is vacated and the case is remanded to BLM with instructions, as set forth herein.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski _____
Administrative Judge